In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-375

SAN FRANCISCO NEWSPAPER PRINTING COMPANY, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The San Francisco Printing Company ("the Company"), which performs certain business functions for the two San Francisco daily newspapers, agreed with the Newspaper & Periodical Drivers' and Helpers' Union, Local 921 ("the Union") to terminate the individual contracts which the Company had with certain newspaper dealers who are responsible for delivery of its newspapers in two subur-

ban counties outside San Francisco; the dealers were given the option of continuing to work under the terms of the collective bargaining contract between the Company and the Union (Pet. App. 25, 26-31). Some of the dealers filed charges with the Board alleging that this agreement violated Section 8(e) of the National Labor Relations Act, as amended, 73 Stat. 543, 29 U.S.C. 158(e) (Pet. App. 31).[1] The Board (with one Member dissenting) found that, although the dealers possessed certain indicia of independent contractor status, these were outweighed by other factors pointing to employee status (Pet. App. 16, n. 2). Since Section 8(e) does not purport to govern the relationship between an employer and his employees, the Board accordingly dismissed the case without reaching the merits of whether the agreement would violate Section 8(e) (Pet. App. 60-61).

The court of appeals found the dealers to be independent contractors rather than employees, citing the degree of the dealers' "risk of loss and opportunity for profit," the "entrepreneurial aspects" of the relationship, and their "proprietary interest" (Pet. App. 9-12). The court therefore reversed and remanded the case to the Board for a determination of whether the agreement violated Section 8(e) (Pet. App. 14).

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[1] Section 8(e) provides: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer * * * agrees to cease * * * doing business with any other person * * *."

2. We believe that the Board was reasonable in concluding that the facts supporting employee status outweighed those supporting independent contractor status, and that therefore the court below should have accepted the Board's conclusion that the dealers were employees. However, the court applied the correct test for determining independent contractor status. See *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254. Its judgment simply represents a differing appraisal of the particular facts of this case.[2]

Moreover, the issue is not yet ripe for review. Before the Board "[t]he parties agree[d] that if the Dealers are employees, there can be no Section 8(e) violation. * * * However, if the Dealers are found to be independent contractors, the question is posed whether [the agreement] has a primary work preservation objective so as to insulate it from a Section 8(e) violation" (Pet. App. 31). On remand, petitioners will have an opportunity to show that their agreement had a valid work preservation objective, and, if they are successful, no violation of Section 8(e) will be found. On the other hand, if the Board finds that the agreement violates Section 8(e) and

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[2] The court below distinguished *The Herald Company* v. *National Labor Relations Board*, 444 F. 2d 430 (C.A. 2)—which petitioners assert is in conflict (Pet. 11-16)—pointing out that there, unlike here, "the record disclosed the company's substantial control over the dealer's immediate income and the ultimate value of his distributorship, plus extensive policing of delivery and compulsory participation in promotions" (Pet. App. 13).

the court of appeals affirms, petitioners will
to seek review in this Court not only of the
whether the agreement had a valid work pr
objective, but also of the threshold question
the dealers were in fact independent con
Mercer v. *Theriot*, 377 U.S. 152, 153-154.

The petition for a writ of certiorari sh
denied.

Respectfully submitted.

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